Corrugated Carton Products Sdn Bhd v Kong Long Huat Realty Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–82 OF 1999

MOHD SAARI, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA

28 JUNE 2003

Contract *— Sale and purchase of land — Terms — Whether the purported termination of the agreement by the defendant was legally valid and effective in the circumstances of the case — Construction of agreement — Whether clause 3(a) of the agreement on its proper construction gave the plaintiff an automatic right to a further period of 30 days upon expiry of the 90-day completion date of the sale and purchase*

By an agreement ('the agreement') the defendant — the registered owner of land — agreed to sell and the plaintiff agreed to purchase the said land at the agreed price of RM550,000 and on such other terms and conditions as contained in the agreement. A deposit of RM50,000 was paid by the plaintiff to the defendant. Thereafter, the plaintiff made no further payment. Vide a letter, the defendant sought to terminate the agreement with immediate effect. The plaintiff informed the defendant that it could not agree or accept the unilateral termination of the sale. The issue before the court was whether cl 3(a) of the agreement on its proper construction gave the plaintiff an automatic right to a further period of 30 days upon expiry of the 90-day completion date of the sale and purchase ('the completion date').

Held, dismissing the appeal:

The words 'shall grant' appearing in cl 3(a) of the agreement taken by themselves would mean that the defendant was under obligation to grant the extension to the plaintiff without the plaintiff having to apply for the extension. However, word or words in an agreement ought not to be construed in isolation, they need to be construed within the context of the agreement as a whole. Looking at cl 3(a), it was clear that the plaintiff was required to complete the purchase of said property within 90 days of the date of the agreement. This 90-day period, however, was subject to a further extension of 30 days upon payment of interest by the plaintiff on the balance sum at the stipulated rate. What cl 3(a) provided was that the purchaser is entitled to an extension of the completion date 'upon payment of interest on the outstanding balance ...'. The plain meaning of this would be that the purchaser would have to pay interest on the balance sum if he wants to have the completion date extended. Thus, by necessary implication, in order to bring this provision into effect it was incumbent upon the purchaser to notify the vendor of his intention to have the completion date extended. The plaintiff failed to notify the defendant of its desire to have the completion date extended (see pp 198F–199A).

[Bahasa Malaysia summary

Melalui satu perjanjian ('perjanjian tersebut'), defendan — pemilik berdaftar tanah — telah bersetuju untuk menjual dan plaintif telah bersetuju untuk membeli tanah tersebut dengan harga yang dipersetujui berjumlah RM550,000 dan berdasarkan terma-terma dan syarat-syarat lain sebagaimana yang terkandung dalam perjanjian tersebut. Satu deposit berjumlah RM50,000 telah dibayar oleh plaintif kepada defendan. Berikutan itu, plaintif tidak membuat apa-apa bayaran selanjutnya. Melalui sepucuk surat, defendan memohon untuk menamatkan perjanjian tersebut dengan serta merta. Plaintif telah memaklumkan defendan bahawa ia tidak boleh bersetuju atau menerima penamatan jualan satu pihak tersebut. Persoalan di hadapan mahkamah adalah sama ada fasal 3(a) perjanjian tersebut berdasarkan pembentukannya yang betul memberikan plaintif satu hak automatik untuk satu tempoh lanjutan 30 hari selepas tamat tarikh penyelesaian 90 hari jual beli tersebut ('tarikh penyelesaian').

Diputuskan, menolak rayuan tersebut:

Perkataan-perkataan 'shall grant' yang terdapat dalam fasal 3(a) perjanjian tersebut dengan sendirinya bermaksud bahawa defendan adalah di bawah obligasi untuk memberikan lanjutan kepada plaintif tanpa perlunya plaintif memohon untuk lanjutan tersebut. Namun begitu, perkataan atau perkataan-perkataan dalam satu perjanjian tidak sepatutnya ditafsirkan secara berasingan, dan perlu ditafsirkan dalam konteks perjanjian tersebut secara keseluruhan. Dengan meneliti fasal 3(a), ia adalah jelas bahawa plaintif dikehendaki menyelesaikan beliau hartanah tersebut dalam tempoh 90 hari dari tarikh perjanjian tersebut. Tempoh 90 hari ini, bagaimanapun, tertakluk kepada lanjutan seterusnya selama 30 hari setelah membayar faedah oleh plaintif atas jumlah baki pada kadar yang ditetapkan. Apa yang diperuntukkan oleh fasal 3(a) adalah pembeli berhak kepada satu lanjutan tarikh penyelesaian 'upon payment of interest on the outstanding balance ...'. Maksud biasanya adalah bahawa pembeli perlu membayar faedah atas jumlah baki jika beliau inginkan tarikh penyelesaian dilanjutkan. Oleh itu, secara tidak langsung, bagi tujuan menguatkuasakan peruntukan ini ia adalah wajib ke atas pembeli untuk memaklumkan penjual tentang niatnya untuk mendapat lanjutan tarikh penyelesaian (lihat ms 198F–199A).]

Notes

For cases on terms of sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3756–3757.

Cases referred to

Jeow Fong Mei v Chong Mee Yoke [1996] 1 MLJ 387 (refd)

A *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd* [1954] 1 WLR 462 (refd)

Appeal from: Suit No S7–22–166 of 1990 (High Court, Kuala Lumpur)

B *Wong Kim Fatt* (*Khor Loke Yew* and *Leong Yin Yee* with him) (*Christina Chia Ng & Partners*) for the appellant.

Karpal Singh (*Ram Singh Deo* with him) (*Karpal Singh & Co*) for the respondent.

Arifin Zakaria JCA (delivering judgment of the court):

C *Background facts*

This is an appeal by the plaintiff in the court below against the decision of the learned trial judge in dismissing the plaintiff's claim and in allowing the defendant's counterclaim. For convenience, the parties will be referred to as 'plaintiff' and 'defendant' respectively.

D The facts leading to this claim may briefly be stated as follows. The defendant is the registered owner of land known as Lot No 8761, CT 25148, Mukim Kajang ('the said land'). By agreement dated 11 October 1989 ('the agreement'), the defendant agreed to sell and the plaintiff agreed to purchase the said land at the agreed price of RM550,000 E and on such other terms and conditions as contained in the agreement. It is not in dispute that a deposit of RM50,000 was paid by the plaintiff to the defendant on or before the execution of the agreement. Thereafter no further payment was made by the plaintiff.

Vide letter dated 10 January 1990, the defendant sought to terminate F the agreement with immediate effect. The said letter shorn of the formalities reads as follows:

> Sale and Purchase Agreement in respect of that piece of land held under CT 25148 Lot No 8761 Mukim of Kajang
>
> We refer to the Sale and Purchase Agreement entered into between ourselves as vendor and yourselves as purchaser dated 11th October 1989.
>
> G We give you notice that we are hereby terminating the said Sale and Purchase Agreement with immediate effect.
>
> To this effect we propose to refund all deposit paid by yourselves to us and thereafter the Sale and Purchase Agreement is to be treated as null and void.

H Through its solicitors, Messrs Lee & Lee, the plaintiff informed the defendant that it could not agree or accept the unilateral termination of the sale. This is found in the plaintiff's solicitors' letter dated 12 January 1990 the material part of which reads as follows:

> Re: Sale and Purchase of land held under CT 25148, Lot No 8761, Mukim I of Kajang
>
> We refer to your clients' letter dated 10 January, 1990 addressed directly to our clients, they purportedly terminated the Sale and Purchase Agreement.

> We are instructed to inform you that our clients do not agree or accept the unilateral termination of the sale by your clients and that they require specific performance. If the sale is not concluded in accordance with the Sale & Purchase Agreement dated 11th October, 1989 our clients may have no alternative but to seek redress in a court of law and shall claim for specific performance and all costs, expenses and consequential damages flowing thereon.
>
> It will be deeply appreciated if you will kindly use your good office to assist in the successful completion of this sale.

The issues

The first issue raised before us is whether the purported termination of the agreement by the defendant was legally valid and effective in the circumstances of the case. This in our view would turn on the construction and effect to be given to the cl 3(a), which stipulates as follows:

> 3(a) Completion of the sale and purchase hereunder of the said property shall take place within a period of Ninety (90) days from the date of this Agreement (hereinafter referred to as 'the Completion Date'). Provided always and it is hereby agreed by and between the parties hereto that the Vendor shall grant to the Purchasers an extension of a further thirty (30) days in respect of the Completion Date but upon payment of interest on the outstanding balance of the purchase price at the rate of eight point five per centum (8.5%) per annum calculated on a daily basis during the period of extension.

The said clause clearly provides that the completion date of the sale and purchase of the said property is within a period of 90 days from the date of the agreement. It is common ground that the completion date falls on 9 January 1990, ie one day prior to the termination letter issued by the defendant. Therefore, it would appear that the defendant had acted within the terms of the cl 3(a) in issuing the termination letter on the 10 January 1990 since the plaintiff failed to duly complete the sale and purchase of the said property at the expiry of the 90-day period.

The learned counsel for the plaintiff conceded that the completion date falls on 9 January 1990, however, he contended that according to the cl 3(a) the plaintiff is entitled to an extension of a further 30 days from 9 January 1990. He placed much emphasis on the stipulation that, '... the vendor shall grant to the Purchasers an extension of a further thirty (30) days in respect of the Completion Date' subject to the plaintiff paying interest on the outstanding balance of the purchase price at the rate of 8.5%pa calculated on a daily basis. It is contended that this provision gives the plaintiff the automatic right of extension of the completion date subject only to payment of interest as aforesaid. In support of his contention, the learned counsel cited the case of *Jeow Fong Mei v Chong Mee Yoke* [1996] 1 MLJ 387. To properly appreciate the premise upon which the decision was arrived at by the court in that case, it is necessary in our view to consider the factual matrix in that case. In that case under cl 4 of the sale and purchase agreement, the balance of the purchase price was to be paid within three months of receipt of notification by the vendor's solicitor's to the

purchaser's solicitors that the second consent has been obtained, failing which the vendor shall grant the purchaser an extension of two months to settle the outstanding balance of the purchase price. The defendant was notified by the appropriate authority of the approval for transfer of the said premises on 12 July 1993. The defendant solicitors notified the purchaser's solicitors that the dateline for the payment of purchase price would be 12 October 1992. The letter was received by the purchaser's solicitors on 14 July 1993. The defendant purported to terminate the agreement by letter dated 13 December 1993. The learned judicial commissioner held that the extended date of completion expired on 12 December 1993. This court in that case held that the final date the purchaser was required to pay the balance of the purchase price was 13 December 1993 not 12 December 1993, hence the termination letter was one day too early.

The learned counsel for the defendant contended that in the said case the issue of whether the extension of two months was mandatory under cl 4 of the agreement was never canvassed before the court and as such the decision of the court did not turn on that issue. On reading the judgment of the court, we fully agree with the submission of learned counsel for the defendant that the court did not address that issue in the said case. This is supported by what was said by Abdul Malek Ahmad JCA at p 390:

> By cll 4 and 7 of the agreement, it is clear that the plaintiff had three plus two calendar months from the date of receipt of the notification to make payment of the balance of the purchase price to the defendant failing which the agreement is considered determined with no further legal effect and a sum equivalent to ten per cent of the purchase price shall be forfeited as liquidated damages and any sum in excess thereof paid by the purchaser to the vendor shall be refunded to the purchaser free from interest.
>
> It is the computation of time of the five calendar months that is causing the problem. The contention of learned counsel for the plaintiff is that since the receipt of the letter was on 14 July 1993, the time for payment expires on 14 December 1993, and the plaintiff could still make payment on that date. The purported termination agreement by the defendant's letter dated 13 December 1993, was therefore, in his view, premature.

Further down at p 392, he said:

> Since we found that the extension would only commence on 14 October 1993, and end on 13 December 1993, the defendant's termination letter dated 13 December 1993, was certainly one day too early as the plaintiff could still pay up to midnight on that date.

The issue before us is whether cl 3(a) of the agreement on its proper construction gives the plaintiff an automatic right to a further period of 30 days upon expiry of the 90-day period. The relevant part of cl 3(a) stipulates that,

> ... the Vendor shall grant to the Purchaser an extension of a further thirty (30) days in respect of the Completion Date but upon payment of interest on the outstanding balance of the purchase price ... calculated on a daily basis during the period of extension.

The learned counsel for the plaintiff contended that because of the words 'shall grant' in the said cl 3(a), it is mandatory for the defendant to grant the said extension without the plaintiff having to apply or indicate its interest in having the period extended. The learned counsel for the defendant on the other hand contended that the grant of an extension is not automatic. He, however, conceded that by the said clause the defendant is no doubt obliged to grant the extension but it is implied in the said clause that as a necessary precondition the plaintiff need to notify the defendant of its desire to have the period so extended. In other words, the plaintiff is not automatically entitled to the extended period of 30 days.

The issue before us is what is the proper construction that ought to be given to cl 3(a). The judicial approach to the construction of contractual terms is well summarized in para 12.040 of *Chitty on Contracts, General Principles* Vol 1 (27th Ed) which reads as follows:

> *Intention of the parties.* The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. This is to say, the meaning of the document or of a particular part of it is to be sought in the document itself. One must consider the meaning of the words used, not what one may guess to be the intention of the parties. However, no contract is made in a vacuum. In construing the document, the court may resolve an ambiguity by looking at its commercial purpose and the factual background against which it was made.

In *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd* [1954] 1 WLR 462, a case concerning the interpretation of a charterparty agreement Romer LJ at p 496 observed as follows:

> ... I think if one takes clause 38 by itself one could legitimately construe it either in the way contended for by the charterers or in the way relied on by the shipowners without doing undue violence to the language used. But it is not permissible to construe one clause in isolation from the other.

Reverting to the present case, we agree that the words 'shall grant' appearing in cl 3(a) taken by themselves would mean that the defendant is under obligation to grant the extension to the plaintiff without the plaintiff having to apply for the extension. However, as stated above word or words in an agreement ought not to be construed in isolation, they need to be construed within the context of the agreement as a whole. Looking at cl 3(a), it is clear that the plaintiff is required to complete the purchase of said property within 90 days of the date of the agreement. This 90-day period, however, is subject to a further extension of 30 days upon payment of interest by the plaintiff on the balance sum at the stipulated rate. The question that arises is whether this interest is payable only if the plaintiff decides to proceed with the purchase or is payable in any case whether the plaintiff decides to proceed with the purchase or otherwise. We think the answer to this question is crucial to the issue before us whether the plaintiff needs to give notice of its intention to have the completion date extended or otherwise. What cl 3(a) provides is that the purchaser is entitled to an extension of the completion date 'upon payment of interest on the outstanding balance ...'. In our view, the plain meaning of this would be

A that the purchaser will have to pay interest on the balance sum if he wants to have the completion date extended. Thus, by necessary implication, in order to bring this provision into effect it is incumbent upon the purchaser to notify the vendor of his intention to have the completion date extended.

In the present case, not only that the plaintiff failed to notify the B defendant of its desire to have the completion date extended but in its solicitors' letter of 10 January 1990, the plaintiff contended that it is not obliged to pay the interest on the balance sum since it has fulfilled all its obligations under cl 3(c).

However, from the undisputed facts before the court we find that on the completion date neither the balance of the purchase price had been paid nor C the necessary undertaking had been furnished to the stakeholders. Further, as we have said earlier, the plaintiff also failed to notify the defendant of its intention to have the completion date extended. Therefore, based on those facts we are of the view that the defendant was clearly acting within its right in terminating the agreement vide its letter of 10 January 1990.

D

The counter claim by the defendant for the deposit

In the sixth ground of appeal, the plaintiff contends that:

> In respect of the counterclaim, the learned judge erred in law and fact in ordering payment to the Respondent the sum of RM50,000 with interest E when the Respondent never made such a claim. The Respondent only sought in the counterclaim that the sum of RM50,000 be forfeited.

Looking at the order of court dated 3 January 1999, it is clear that the learned judge had allowed the counterclaim by the defendant for the sum of RM50,000 and further ordered that an interest of 8%pa be paid on the said F sum to be calculated from 9 January 1990 until full payment. From the facts before the court, it is not in dispute that the said sum of RM50,000 was paid by the plaintiff to the defendant on or before the execution of agreement pursuant to cl 2(a). This is further confirmed by the defendant's letter of 10 January 1990 in which the defendant proposed that all the deposits paid by the plaintiff be refunded to the plaintiff. Therefore, we agree with the G contention of the plaintiff that it is erroneous on the part of the court to allow the counterclaim by the defendant on those terms. In our view that the correct order would have been that the sum of RM50,000 being the deposit paid under the agreement be forfeited to the plaintiff pursuant to cl 9. Since the said deposit had already been paid to the defendant therefore the order by the learned judge for payment of interest by the plaintiff on the H said sum also ought to be set aside.

There is one other issue raised by the plaintiff's counsel with regard to the forfeiture of the deposit. He contended that since the defendant in its letter of 10 January 1990 offered to refund all deposits to the plaintiff therefore rightly no order of forfeiture of the deposit should, in the I circumstances, be made against the plaintiff. Learned counsel for the defendant countered by saying that the offer for refund was made with a view of the parties reaching an amicable settlement on the matter, however,

since the plaintiff had elected to commence legal action against the defendant, the offer could not be taken against the defendant. Reading the relevant part of the letter, we agree with the contention of the learned counsel for the defendant that the offer to refund the deposit made by the defendant is subject to the plaintiff agreeing to treat the agreement as null and void. Since the plaintiff refused to treat the agreement as null and void, therefore, naturally the offer no longer stands. In the circumstances, we think the defendant is entitled to have the deposit forfeited in accordance with cl 9.

Conclusion

For the above reasons we dismissed the plaintiff's appeal herein with costs, however, the order of the court directing the plaintiff to pay to the defendant the sum of RM50,000 together with interest of 8%pa thereon is hereby set aside and we substitute, therefore, with an order that the sum of RM50,000, being the deposit paid to the defendant, be forfeited to the defendant.

The decision in this case was delivered on 7 February 2003 and in the meantime one member of the panel, Mohd Saari Yusoff JCA had since retired. The other member of the panel, Mohd Noor Ahmad JCA has read this judgment in draft and has expressed his agreement with the same.

Appeal dismissed.

Reported by Peter Ling